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DEPARTMENT OF JUSTICE

Office of the Attorney General

28 CFR Part 0

OAG Docket No. 152; A.G. Order No. 3754-2016

Conforming Justice Department Regulations to the Federal Vacancies Reform Act of 1998

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This final rule amends the Department of Justice (DOJ) organizational regulations to remove authority from United States Attorneys (USAs) to designate any Assistant United States Attorney as Acting United States Attorney. The Federal Vacancies Reform Act of 1998 governs designations of Acting USAs. The removal of authority from USAs is designed to bring DOJ's organizational regulations in compliance with the Act.

DATES: This rule is effective [INSERT DATE OF PUBLICATION].

FOR FURTHER INFORMATION CONTACT: Jay Macklin, General Counsel, Executive Office for United States Attorneys, 600 E Street, NW, Suite 5100, Washington, DC 20530; Telephone: (202) 252-1600; Fax: (202) 252-1650.

SUPPLEMENTARY INFORMATION: The Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345-3349d, provides that, when a Senate-confirmed officer in an Executive agency "dies, resigns, or is otherwise unable to perform the functions and duties of the

office,” the First Assistant to that office automatically becomes the acting officer, unless the President designates someone else to perform the functions and duties of the office under 5 U.S.C. 3345(a)(2) or (a)(3). 5 U.S.C. 3345(a)(1). Only individuals performing the functions and duties of a vacant office pursuant to 5 U.S.C. 3345 may use the acting title, because the Act, with exceptions not relevant here, is “the exclusive means for temporarily authorizing an acting official to perform the functions and duties” of an office covered by the Act. 5 U.S.C. 3347. Currently, 28 CFR 0.136, which governs the designation of Acting USAs, is inconsistent with the Act, insofar as it authorizes each USA to designate any AUSA in the office to perform the functions and duties of the USA office and use the title of Acting USA.

The Department’s regulations already account for potential USA vacancies under 28 CFR 0.137(b), which provides that each Department office “to which appointment is required to be made by the President with the advice and consent of the Senate (PAS office) shall have a First Assistant within the meaning of the Federal Vacancies Reform Act of 1998,” and “[w]here there is a position of Principal Deputy to the PAS office, the Principal Deputy shall be the First Assistant.” *Id.* The offices of USAs each have a First Assistant United States Attorney who is considered the Principal Deputy for purposes of § 0.137(b) and, by operation of the Act, automatically becomes the Acting USA when the USA leaves office or is otherwise unable to perform the office’s functions or duties, unless the President designates another individual to serve as Acting USA.

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

This rule is limited to agency organization, management, or personnel matters, and accordingly it is not subject to review under Executive Order 12866, § 3(d) (Sept. 30, 1993).

Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 (Aug. 4, 1999), the Department has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

Administrative Procedure Act

This rule is exempt from the rulemaking provisions of 5 U.S.C. 553 because this action pertains to rules of agency organization, procedure, and practice. 5 U.S.C. 553(b)(3)(A). Accordingly, it is not necessary to issue this rule using the notice and public procedure set forth in 5 U.S.C. 553(b), and the requirement of a delayed effective date in 5 U.S.C. 553(d) does not apply.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it

will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 et seq.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this rule and, by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities. The rule removes authority that was inconsistent with the Federal Vacancies Reform Act of 1998.

Congressional Review Act

This action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties. Accordingly, it is not a "rule" for purposes of the reporting requirement of 5 U.S.C. 801. *See* 5 U.S.C. 804(3). Therefore, the reports to Congress and the General Accounting Office are not required.

List of Subjects in 28 CFR part 0

Authority delegations (Government agencies), Government employees, Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements, Whistleblowing.

Accordingly, by virtue of the authority vested in me as Attorney General, including 5 U.S.C. 301 and 28 U.S.C. 509 and 510, Chapter I of Title 28 of the Code of Federal Regulations is amended as follows:

PART 0 -- ORGANIZATION OF THE DEPARTMENT OF JUSTICE

1. The authority citation for part 0 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 515-519

§ 0.136 [Removed and Reserved]

2. Remove and reserve § 0.136.

Dated: October 14, 2016.

Loretta E. Lynch
Attorney General

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